VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
ATTORNEYS AT LAW

BRIDGEWATER PLACE
POST OFFICE BOX 352 · GRAND RAPIDS, MICHIGAN 49501-0352
TELEPHONE 616 / 336-6000 FAX 616 / 336-7000

July 13, 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M St. NW
Washington, DC 20006

Re: In the Matter of: Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93, Notice of Proposed Rulemaking

Dear Mr. Caton:

Enclosed herewith for filing are the original and nine (9) copies of Michigan and Texas Communities' Initial Comments in the above-captioned proceeding.

Please acknowledge receipt by affixing an appropriate notation on the copy of the Initial Comments furnished for such purpose and remit same to the bearer.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Randall W. Kraker

RWK/bjs
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

To the Commission:

MICHIGAN AND TEXAS COMMUNITIES' INITIAL COMMENTS ON NOTICE OF PROPOSED RULEMAKING

City of Detroit, City of Allegan, City of Belding, City of Buchanan, City of Cedar Springs, City of Coldwater, City of East Grand Rapids, City of East Tawas, City of Escanaba, City of Fremont, City of Garden City, City of Grand Haven, City of Grandville, City of Hudsonville, City of Kentwood, City of Livonia, City of Lowell, City of Marquette, City of Milan, City of Niles, City of Otsego, City of Rockford, City of Saline, City of Tawas City, City of Walker, City of Wyoming, City of Zeeland, Alabaster Township, Alpine Charter Township, Au Sable Charter Township, Baldwin Township, Benton Charter Township, Byron Township, Gaines Charter Township, Georgetown Charter Township, Grand Rapids Charter Township, Harrison Charter Township, Oscoda Township, Plainfield Charter Township, Sheridan Charter Township, Tilden Township, Van Buren Charter Township, Whitewater Township, Yankee Springs Township, Zeeland Township, Village of Chelsea, Village of Dexter and the City of Arlington, Texas (collectively "Michigan and Texas Communities").

John W. Pestle
Randall W. Kraker
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Bridgewater Place
P.O. Box 352
Grand Rapids, Michigan 49501-0352
(616) 336-6000

July 14, 1995

Their Attorneys

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SUMMARY

Forty-eight cities, townships and villages in Michigan and the City of Arlington, Texas ("Michigan and Texas Communities") submit these comments in response to the Commission's Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93, FCC 95-180, ___ FCC Rcd ___ (Released May 15, 1995).

Michigan and Texas Communities address the following issues:

Zoning and building restrictions are well established responsibilities of the local government. The proposed rules eliminate the protection of zoning and building restrictions and will have negative consequences on the public health, safety and welfare. The proposed rule conflicts with the principles of federalism and is inconsistent with the prevailing views in Congress which seek to return more responsibility to states and local governments. The proposed rule inappropriately raises the federal interest in satellite communications above the equally compelling interest in the promotion of the safety of life and property. Local building and zoning laws are not presumptively in conflict with the express provisions of the Communication Act. Lacking expressly stated complete preemption of the field by Congress, the FCC may not impose the proposed rule without violating the Tenth Amendment. Application of the proposed rule may also create an inverse condonation/regulatory taking of private property for the public interest and will cause diminution of value of privately held property. Implementation of the proposed rule will cause a proliferation of litigation and will cause discord between neighbors. The effect of the proposed rule also imposes an unfunded mandate on local government and negatively impacts local budgets. The current rule is less burdensome and more cost effective means

of effecting the FCC's goals than is the proposed rule. Finally, if the FCC preempts all local building and zoning ordinances and reasonable cost based fees, it must protect the local interest.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
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To the Commission:

MICHIGAN AND TEXAS COMMUNITIES' INITIAL COMMENTS ON NOTICE OF PROPOSED RULEMAKING

Forty-eight cities, townships and villages in Michigan and the City of Arlington, Texas ("Michigan and Texas Communities") submit these comments in response to the Commission's Notice of Proposed Rulemaking, IB Docket No. 95-59, DA 91-577, 45 DSS-MISC-93, FCC 95-180, _____ FCC Rcd _____ (Released May 15, 1995) in this matter.

Michigan and Texas Communities address the following issues:

I. MICHIGAN AND TEXAS COMMUNITIES' INTEREST IN THIS MATTER

A. The Michigan and Texas Communities Have Diverse Characteristics But Share A Common Concern

Michigan and Texas Communities are the local governmental zoning and building authorities for their respective jurisdictions. They include the City of Detroit, the largest city in the State of Michigan, as well as other cities, townships, and villages located in both Michigan's Lower Peninsula and Upper Peninsula.[1] They also include the City of Arlington,

[1]To give this Commission some sense of the geographic dispersal of the Michigan municipalities, the City of Detroit is closer to Washington, D.C. than it is to Michigan municipalities located towards the western end of Michigan's Upper Peninsula.

Texas, the third largest municipality in the Dallas/Fort Worth metropolitan area. The Michigan and Texas Communities range in population from over 1,000,000 to less than 1,000.

The Michigan and Texas Communities are a large group of municipalities that are economically, ethnically, and geographically diverse. They include Detroit, the largest city and one of the oldest cities in the State of Michigan, as well as many established, older suburban communities. Michigan and Texas Communities also include suburban communities that are in the midst of active development and expansion. Finally, Michigan and Texas Communities include many cities and villages of small to medium size as well as rural townships. Michigan and Texas Communities have a wide ethnic diversity, including large African-American, Hispanic, Dutch, Finnish (and other Scandinavian), Central European, and Welsh populations. Their economies are similarly diverse: some have large populations at or below the poverty level, others are relatively affluent. Michigan and Texas Communities are representative of the types and sizes of local government units throughout the United States. In spite of their diversity, Michigan and Texas Communities bring to the Commission a common interest and point of view with regard to the above referenced Notice of Rulemaking ("NPR").

B. Zoning And Building Restrictions Are Well Established Responsibilities Of Local Government

Michigan and Texas Communities have identical interests and a common position on the serious local problems created by the preemption of local zoning and building regulations as proposed by the NPR. The adoption and implementation of zoning and building regulations are fundamental functions of local government, functions that its

citizens expect them to perform. These regulations are grounded in the public power.

Comprehensive zoning restrictions were ruled to be constitutional by the U.S. Supreme Court in 1926, *Euclid v Ambler Realty Co.*, (272 US 365 (1926). The Court at pages 388-389 reflected that "a nuisance may be merely the right thing in the wrong place--like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." A police power regulation, such as the zoning ordinance in question, was not invalid simply because it was "drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves;" because "the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." This broad and expansive view of the police power has been adopted and followed by federal and state courts in upholding the constitutionality of zoning.

The police power is inherent in the sovereign power of the state to regulate private conduct to protect and further the public welfare. Courts have universally held that this power includes within its scope all manner of laws deemed necessary by the legislature to promote public health, safety, morals or the general welfare. As an inherent attribute of governing authority, the police power antedates the federal constitution. The broad scope of the police power, in the context of land use regulation, is found in *Berman v Parker*, 348 U.S. 26,33 (1954): "The concept of the public welfare is broad and inconclusive.. . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

The Standard Zoning Enabling Act promulgated by the U.S. Department of Commerce in the mid 1920s sets forth the basic purposes of a zoning ordinance. Zoning regulations are designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations are made with a view to conserving the value to buildings and encouraging the most appropriate use of land throughout the municipality. Among the primary purposes are the protection of property values by the separation or restriction of incompatible uses and the enhancement of safety.

C. The Proposed Rules Will Eliminate The Protection Of Zoning and Building Regulations and Will Have Negative Consequences on the Public Health, Safety and Welfare

The Michigan and Texas Communities are concerned that the proposed rule would permit a satellite dish of any color with no screening or landscaping to be placed anywhere in the front yard of a home or business. Zoning ordinances typically prohibit all structures in the front yard (not just satellite dish antennas). And for good reason; the rationale is obvious. Structures in the front yard (between the home or principal building and the street) interfere with and impair clear vision necessary to safely enter and exit the street, with obvious safety consequences. Impairing that clear vision has the potential for increasing personal injury and property damage accidents and creating unsafe situations for children playing in the front yard, people walking on the sidewalks, and persons traveling in vehicles on the street. There are also aesthetic concerns with the proposed rule. All of

these concerns have the potential to diminish the property value of neighboring properties and to interfere with the quite enjoyment of neighboring property.

The proposed rule would also appear to allow satellite dishes of any color with no screening or landscaping to be located immediately adjacent to the lot line between two neighboring properties. The proposed rule appears to preempt all property line set back requirements. Zoning ordinances typically require some minimal separation between any structure on one lot and the neighboring property line. The preservation of light and air between uses, the wisdom of allowing room between structures for fire fighting activities, the reduction of risk of one structure collapsing onto a neighboring property and causing personal injury or property damage, all support this common practice of imposing set back requirements in zoning ordinances which mandate some open space between structures and the neighboring property line.

The constitutionality of the typical yard and set back requirements discussed in the prior two paragraphs has been secure since 1927. *Gorieb v Fox*, 274 U.S. 603 (1927).

The proposed rule appears to exempt satellite dish antenna installation and construction from the application of local building and construction codes. It is rare to find any community that is not subject to a building or construction code which guarantees that all construction must meet at least minimal safety requirements. Although there may be regional differences with regard to snow load concerns in the north or hurricane wind concerns along coastal areas, it would be rare to find a community that is not governed by a building or construction code. For example, in Michigan, every municipality must enforce either the State Construction Code promulgated by the Michigan Construction Code or

another nationally recognized building code such as the BOCA Code. MCLA 125.1501 et seq. These codes provide requirements for fastening antennas to buildings, anchoring antennas, load calculations for roof supports, etc. All of these matters and more are aspects building and construction code regulations which should remain applicable to satellite dish antennas. That building and construction codes are directly related to the promotion of safety cannot be disputed. However, the proposed rule appears to preempt them.

Michigan and Texas Communities are very concerned about the preemption of zoning and building regulations. For example, most communities of any size in the State of Michigan have zoning ordinances in place to preserve and protect the public health, safety, and general welfare of their citizens and to protect and preserve the property values of their communities. Nationally, as of 1981, at least 98 percent of cities with a population of over 10,000 and 90 percent of all municipalities with a population of over 5,000 had adopted zoning ordinances.

The largest investment by the great majority of citizens is the investment in their home. Anything that negatively impacts that investment is taken very seriously by homeowners. Zoning is meant to protect that investment. If the proposed rule is adopted, the FCC (and Congress) should be prepared for howls of protest from the average citizen when a strange colored satellite dish is installed without adherence to any building or construction standards on a neighbor's front yard immediately next to the lot line.

The proposed approach of the NPR completely ignores the legitimate local concerns that are reflected in the provisions of most zoning ordinances with regard to the location of accessory structures and in the obviously safety related requirements of building and

construction codes. The FCC should not go to that extreme to advance the interests of the satellite dish industry.

In addition, the Michigan and Texas Communities are concerned that the proposed rule eliminates the possibility of collecting reasonable cost based permit fees for inspection and review of satellite dish antenna applications. In Michigan, permit fees must be reasonably related to the actual cost of the permit issuance. Michigan law would find fees that are not related to actual municipal costs to be unreasonable and invalid. However, the proposed rule makes it likely that even such reasonable cost based fees will be challenged as "substantial" under Rule 25.104(a) and invalidated. Of course such a result simply passes the costs of the permit review and issuance process from the beneficiaries (satellite dish owners) to the tax payers generally, and further reduces the financial ability of the municipality to provide other necessary governmental services to its citizens.

Finally, the proposed Rulemaking goes too an extreme to address a "problem" that may have existed, if at all, in only a handful of situations. The "documentation" of problems relating to municipal interference with the construction and installation of satellite dish antennas set forth in the NPR is sparse at best. A handful of anecdotal situations are referenced, but over four million satellite dishes are in operation. It appears that nearly all of the four million existing satellite dishes were installed without resort to the FCC. The proposed rule is the equivalent to using a nuclear bomb to kill a gnat.

II. THE PROPOSED RULE CONFLICTS WITH PRINCIPLES OF FEDERALISM

Many of the comments of Michigan and Texas Communities are broadly grounded in the concept of federalism: the desirability of preserving local control and responsibility and the need to enhance the ability of local communities to negotiate solutions to local problems to the maximum extent feasible.

This approach is fully consistent with the prevailing views in Congress and at the White House. See remarks of Speaker Gingrich to the National League of Cities conference, March 13, 1995 (1995 WL 6622147 at *3):

> We are determined to return power to localities. . . . I believe if we get power back home in a serious way and if people get in the habit once again of taking citizenship seriously, we will be very pleased with how much more flexible and creative and, candidly, how much less expensive it is to solve problems in America when they're being solved locally by local folks who understand local conditions.

Speaking to the same group, President Clinton noted that his administration has "shifted power away from Washington to more responsibility for states and counties and cities and towns." 1995 WL 6622142 at p. 6.

The benefits of federalism, including local handling of issues of local concern, will best be achieved by applying the carefully balanced federal/local framework.

A. The FCC Overstates the Nature of the Federal Interest in Satellite Communications

The FCC claims broad power to preempt local zoning ordinances by the authority of the Communications Act, 47 U.S.C. § 151, (the "Communications Act"). Section § 151 provides, in pertinent part, that the Communications Act was enacted:

> For the purpose of regulating interstate and foreign commerce in the communication . . . so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and

> radio communication service . . . *for the purpose of the national defense,* [and] *for the purpose of promoting safety of life and property.*

47 U.S.C.A. § 151 (emphasis added). Although there is a federal interest in ensuring that all citizens have access to multiple forms of media (*Congressional Findings and Policy: Cable Act of 1992* at (a)(6)), the Communications Act does not assert any express interests that would justify preemption of all local satellite zoning ordinances. The imposition of regulations by local governments on the installation of satellite dishes does not jeopardize the stated federal interests in national defense. Moreover, local zoning and building restrictions advance the federal interest in "promoting safety of life and property." It is the Commission's proposed rule which totally ignores the safety of life and property in violation of Section 151.

Zoning ordinances do not prevent the public from gaining access to communications media; rather, these regulations protect the public good by limiting the construction of media transmitters and receivers where they would hamper the safety, or injure lives, and property of the general public. Assuming that there is a well-defined federal interest in providing broad access to satellite programming, surely there is an equal local and (by statute) federal interest in preserving a homeowner's intrinsic right to maintain the value of his property investment, and the safety of his life, and the lives and property of others in his community. *See*, U.S. Const., amend XIV.

B. Where Congress has Expressly Mandated Limited Preemption, the FCC may not Promulgate a Rule Preempting an Entire Field

1. Pursuant to the Commerce Clause, Congress could Preempt the Entire Field of Local Land Use Regulation

The Commerce Clause grants Congress plenary authority to regulate matters affecting interstate commerce, and to eliminate unconstitutional burdens on national commerce. *See generally*, Nowak, Rotunda, & Young *Constitutional Law* et al., § 9.3 (3rd ed, 1986). The Preemption Doctrine provides that Congress may preempt an entire field by express mandate. If Congress does not explicitly preempt a field, the judiciary may be asked to find an implied preemption of the field. In the latter case, the courts must determine whether application of state or local regulations will impermissibly interfere with Congressional objectives. However, where there is clear indicia of the Legislative Branch's intent to preempt a field of historically local control, the court must balance conflicting interests at the local and federal level. The Supreme Court has often deferred to state and local governmental measures regulating health and safety, in the absence of express federal preemption. *Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) (Congress must clearly manifest intent to supersede a state safety measure); *See, e.g., Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960) (federally regulated ocean vessels may be required to meet local pollution standards); *Florida Lime & Avocado Growers Inc. v. Paul,* 373 U.S. 132 (1963) (states may impose higher standards on produce federally approved for interstate commerce).

Preemption of local law is appropriate only where (1) a federal regulatory scheme occupies a field as to preempt all state or local regulation, (2) there is a need for national

uniformity, or (3) there is a danger of conflict between federal and state or local law. *See, Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding field of foreign policy is occupied by the national government in such a degree that preemption of all state regulation is justified); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956) (defining the three part preemption inquiry). In the last decade, the United States Supreme Court recognized that even where an area of "uniquely federal interest" is involved, it is inappropriate to preempt state (or local) law unless there is a "significant conflict" between the federal interest and the local law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 500 (1988). The judiciary further concludes that "[p]reemption should not, however, be presumed absent a clear manifestation of federal intent to exclude state law provisions." *Guschke v. City of Oklahoma City*, 763 F.2d 379, 383 (10th Cir. 1985) (citing *Chicago & N.C. Tans. Co. v. Kala Brick & Tile Co.*, 450 U.S. 311, 317 (1981); Nowak, et al., § 9.4 ("[T]he Court will not lightly presume the invalidity of state regulations").

Absent a clear statutory mandate, courts will not presume intent to preempt a field absent strong evidence that Congress *left no room* for the coexistence of local law in that field. To the contrary, the Tenth Circuit concludes that:

> . . . States are not, however, prohibited from regulating matters of legitimate local concern, *such as zoning, even though such regulation may affect interstate commerce.* The zoning restraint on the height of radio towers has only incidental impact on interstate commerce. *Conversely, the state's interest in zoning is great.* The height restrictions are not, in either purpose or effect, a protectionist measure.

Guschke, 763 F.2d at 384 (citations omitted) (emphasis added); *See also, U.S. v. Lopez*, 115 S.Ct. 1624, 1629, 1634 (1995) (declaring that there is a "distinction between what is truly national and what is truly local" and that Congress cannot use a "relatively trivial impact on commerce" as a basis for broad regulation of state activities).

2. Congress Intends to Preempt Only State and Local Laws that are in Conflict with the Express Provisions of the Communications Act

The Communications Act expressly provides for preemption of laws of political subdivisions which conflict with the provisions of the Act. *See, e.g.,* 47 U.S.C. § 556(c) (law of political subdivision inconsistent with this chapter shall be deemed preempted and superseded). However, the Communications Act further provides that:

> Nothing in this subchapter shall be construed to affect any authority of any . . . political subdivision, *regarding matters of public health, safety, and welfare* to the extent consistent with the *express* provisions of this subchapter.

47 U.S.C. § 556(a) (emphasis added). The Communications Act contains no express provisions which would authorize the FCC to effectuate the proposed broad preemption of all local zoning laws, pertaining to satellite dish installation. Zoning laws to do not conflict with explicit provisions of the Communications Act and, furthermore, local zoning regulations fall within that sphere wherein Congress has expressly provided that local governments shall retain their authority in "matters of public health, safety, and welfare."

The general public will still have adequate access to sufficient forms of technological media. It is ludicrous to presume, with approximately four million satellite dish customers currently in the United States and broad cable access in most communities,

that citizens are being deprived of access to communications access due to the enforcement of local zoning ordinances. *FCC Report 94-235* (September 28, 1994). Congress has expressly stated that state regulations are not to be preempted unless there is an irreconcilable inconsistency. Here, the FCC proposes to *sua sponte* preempt a field of local regulation by presuming the invalidity of all local zoning ordinances affecting satellite dish installation.

3. If Congress has not Exercised its Constitutional Grant of Authority to its Fullest Extent,, the FCC may not Assert that Authority without Violating the Dictates of the Tenth Amendment

The United States Constitution provides that powers not constitutionally granted to the United States government, which are not denied the states, are reserved for the states or the citizens. U.S. Const., amend X. The principles of federalism have evolved from the earliest days of our country's history. As a nation of concurrent governments, the primary principle is balance and equity. *Garcia v. S.A.M.T.A*, 469 U.S. 528, 550-51 (1985) ("[T]he Federal Government was designed in large part to protect the States from overreaching by Congress"). This principle cannot be maintained if the FCC, as an executive governmental agency, is free to presume that all local land use regulations must bow to a broad claimed federal interest, without clear statutory or constitutional justification for such a gross intrusion into an area of historically local control.

Federal courts have consistently rejected the argument that the federal government's broad radio and telecommunications scheme, promulgated through the FCC, justifies a finding of preemption of all state regulations. Even in those instances where the FCC

partially preempts an area of local regulations (for example, in the current Rule 25.104), such action will not pass judicial scrutiny if the agency's actions are unreasonable or beyond the scope of its power. *See, Guschke*, 763 F.2d at 384 (noting that where the FCC deems to preempt a zoning control, court must determine if such action is reasonable and within the agency's authority). Courts do recognize that the FCC's express preemption of local law may be sustained where the agency has not acted "arbitrarily and capriciously," so long as the action is a "reasonable accommodation of the conflicting policies that are within the agency's domain." *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (1984) (quoting *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984)). It is a travesty to maintain that the FCC's proposed decision to effectuate a blanket preemption policy, which presumes the invalidity of local zoning ordinances, is an equitable compromise between local and federal interests.

The Communications Act does not declare a congressional intent to deny municipalities the right to govern the fundamentally local realm of land regulation. Therefore, a governmental agency "faithfully executing the laws" written by Congress, cannot usurp the powers of a state or local government where Congress has not specifically, or even implicitly provided for such an intrusion into the local police power. U.S. CONST., Art. II, cl. 3 (the Executive Branch "shall take Care that the Laws be faithfully executed); *see generally, Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607 (1980) and *Hampton v. Mow Sun Wong,* 426 U.S. 88 (1976) (concluding that agency regulations are invalid where promulgated without congressional authorization. In light of congressional silence on the issue of zoning ordinances under the Communications Act, the FCC's

proposed rule is unconstitutional and far exceeds the parameters of the executive power. The proposed broad preemption of local zoning ordinances fails to balance the purported federal interests of satellite dish communications against Americans' fundamental Fourteenth and Fifth Amendment rights to property and a safe environment. Congress has not used its commerce clause power to deprive local governments of their authority to regulate land use, and the Constitution does not grant a federal agency the power to preempt local law without Congressional authorization. *Ramirez De Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984). Therefore, the proposed rule is a clear assault to the principles of federalism.

C. The Federal Interest in Satellite Communications does not Outweigh the State and Local Interest in Preserving Life and Property

As described above, zoning restrictions strike a necessary balance between many competing interests. The federal interest is in creating and enhancing a world-wide communications system, and the local citizenry's interest is in preserving the value of their property investments, and maintaining a safe and an attractive living environment. The claimed federal communication interest will not be diminished simply because local governments require satellite dish consumers to follow basic building regulations designed to protect the safety of the public. Moreover, the FCC has previously recognized the importance of balancing the federal government's interest with local governments' interest in regulating local zoning matters. *See, FCC Order PCB-1 (cited in Evans v. Board of County Commissioners*, 994 F.2d 755, 759, 762 (10th Cir. 1993). The Tenth Circuit appropriately held that a local zoning board acted within its legitimate authority in denying a permit for an antenna tower where board ruled that plaintiff's "need for a higher tower was

outweighed by the aesthetic degradation of the neighborhood and potential reduction in property value."

What the Commission's proposed rule totally ignores is that local governments are far more knowledgeable as to their citizen's interest than is the Commission. Local governments, being closest and most accessible to the people, are most responsive to their needs.

Local governments have expressly recognized their citizen's needs for satellite dishes to receive certain programming. This is especially the case in those communities, or portions of communities, which lack conventional cable service.

Local governments at the same time must balance such interests against the interests of their citizens in safe streets, safe buildings, and the prevention of visual pollution with consequent urban blight and decline in property values. These are matters of unique local concern which are best addressed at the local level through zoning and building restrictions.

This Commission has no knowledge or expertise in balancing such interests. It almost exclusively has contacts with the industries it regulates. It rarely has contacts with ordinary citizens, to whom it is inaccessible. It has no knowledge of building codes, and none of zoning, land use or related traffic safety issues.

All the preceding is in marked contrast to local governments, which are in constant contact with the people. If local governments are incorrectly balancing the preceding factors, they will learn about it directly, from the voters. The Commission must defer to the balancing of interests struck by local governments, except arguably in the most extreme cases. The few anecdotal cases cited by the Commission are simply irrelevant, especially

given that such cases are a minute fraction of the 4 million satellite dishes which the Commission's own reports show as being in operation. There is simply no problem of the magnitude that could justify the draconian measures contemplated in the NPR.

1. Safety Concerns are not Adequately Addressed by the Proposed Rule

The proposed rule will kill people by permitting the obstruction of vision in the front yard as children and others enter and leave driveways. Preventing accidents by enhancing visibility is a fundamental principle of traffic engineering and as a consequence setback requirements have been placed in zoning ordinances. The proposed rule will require the municipality to rebut a presumption in favor of Neighbor A, even where Neighbor A installs a bright red satellite dish, without adequate structural support, in the front yard and directly on Neighbor B's property line, perhaps interfering with Neighbor B's beneficial use and enjoyment of his property. Of greater concern is the notion that citizens will have to convince the Commission that the health and safety of their families are at risk. It will be most difficult to prove the likelihood of a traffic accident before the accident has occurred. Nonetheless, does the FCC truly want to wait until a child is killed by the car of the driver whose vision has been occluded by a satellite dish antenna, installed directly on a property line in the front yard?

The FCC disavows any intention "to operate as a national zoning board." NPR, at 3. However, there is little doubt that it will become a Federal Zoning Commission under the proposed rule. The proposed rule effectively deprives local zoning boards of all their

authority where satellite dishes are concerned. Conceivably, there will be no zoning board protecting the general public's interest in maintaining the safety and beauty of America's communities. Such a result does not further the principles of federalism.

2. States and Local Governments have a Fundamental Interest in Land Use Regulation

Congress implicitly recognizes that the enactment and enforcement of zoning ordinances are well within the purview of a locality's police power, as such local regulations are necessary to protect the "public health, safety, and welfare" of the general citizenry. 47 U.S.C. § 556(a), *supra.* The Supreme Court established in early precedent that enactment of local zoning ordinances substantially related to the general public welfare is a valid exercise of the community's police power. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)); *See also, Guschke*, 763 F.2d at 384 (noting that zoning matters are a "legitimate local concern"). Certainly there is no more legitimate local function than protecting the safety of the public, and enabling citizens to preserve the value of their possessions.

The Sixth Circuit has upheld a zoning ordinance against a plaintiff's claim that the current FCC Rule 25.104 preempted a Lansing set back requirement. *Easlick v. City of Lansing*, 1989 WL 46991 (6th Cir. 1989). The court held that the set back ordinance applied to many structures, including doghouses, and thus did not facially discriminate against satellite dish antenna installation. *Id.* at 2. The Sixth Circuit concluded that the local government had reasonable interests in enacting and enforcing set back provisions, including "traffic safety, light, ventilation, fire protection and aesthetic considerations." *Id.*

Clearly, the public welfare is further served when local zoning ordinances protect, not only the safety of the population, but also the value of many members' of the public most significant assets -- their land and houses.

III. APPLICATION OF THE PROPOSED RULE MAY CREATE AN INVERSE CONDEMNATION/ REGULATORY TAKING OF PRIVATE PROPERTY FOR THE FEDERAL INTEREST

A. The Fifth Amendment Commands the Federal Government to Pay Just Compensation where it Takes Private Property to Advance a Federal Interest

The federal government may not take private property for public use without just compensation. U.S. Const., amend. V. Even if the government does not literally "take" a citizen's property, the individual may be entitled to compensation. *See, Langennegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) (noting that "[t]he United States may be held responsible for a taking even when its action is not the final direct cause of the property loss or damage"). The doctrine of inverse condemnation includes regulatory takings. *Flowers Mill Associates v. United States*, 23 Cl.Ct. 182, 188 (1991). A regulatory taking, or inverse condemnation, represents a *de facto* taking where the use and value of private property is materially diminished in the advancement of some governmental interest. *Id.*; Cunningham, Stoebuck, & Whitman, *The Law of Property* 510 (Student ed., 1984).

Evidently the FCC intends to supersede local building and safety requirements without enacting any protective measures for neighboring property owners. Obviously, a person buys a home with the assumption that the property will appreciate over time; usually it is the person's largest investment and one where a return on that investment is expected